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No. 723

In the Supreme Court of the United States

OCTOBER TERM, 1970

WILLIS K. BAKER, JR. and MERVIN "BUD" CORNELSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
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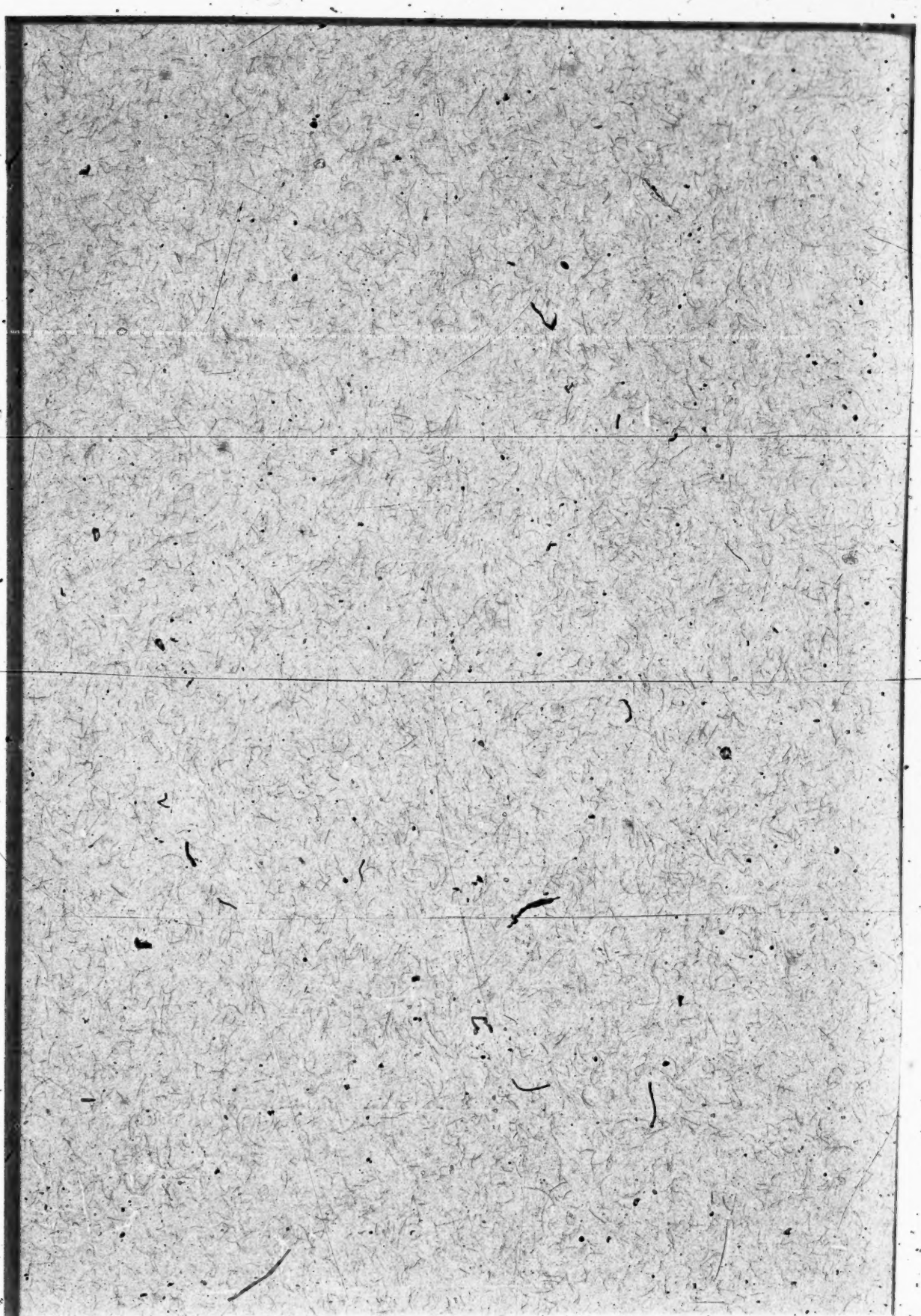

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On June 3, 1966, petitioners, after a jury trial in the Eastern District of California, were convicted of conspiring to receive and convert stolen government property, in violation of 18 U.S.C. 641; petitioner Baker was additionally convicted of the substantive offense of receiving stolen government property, in violation of Section 641. Baker was given concurrent two-year sentences for each offense and was fined

$10,000 for the conspiracy; Cornelsen was sentenced to two years' imprisonment, with all but the first six months suspended. The convictions were affirmed on appeal (Pet. App. iv-xxv; 393 F. 2d 604) and this Court denied a petition for a writ of certiorari. 393 U.S. 836.

Before the sentences could be executed, petitioners filed motions in the district court "objecting to jurisdiction" (purportedly under Rule 35, F.R.Crim.P.), requesting that their convictions be vacated and set aside under 28 U.S.C. 2255, and, in the alternative, requesting under Rule 35 that their sentences be modified. Their jurisdictional attack and request for vacation of sentences was based upon an assertion that the trial court had erred in failing *sua sponte* to give an instruction requiring the jury to find that petitioners knew the stolen property was owned by the government.[1]

The district court ruled that the motion objecting to jurisdiction could not properly be considered under Rule 35 and was untimely if deemed a motion under Rule 34 for arrest of judgment (Pet. App. xxvii). The motion under 28 U.S.C. 2255 was denied both because petitioners were not in custody and because that section cannot be invoked to correct errors in jury instructions (Pet. App. xxviii). The court did modify petitioners' sentences, however, reducing Baker's to a one-year concurrent term on each count (with his fine remaining unchanged) and Cornelsen's to a one-year term with all but the first ninety days

[1] This issue had been raised in their prior petition for certiorari which this Court denied. See Petition in No. 215, O.T. 1968 at 3-6, 15-16.

suspended (*ibid.*). The Court of Appeals for the Ninth Circuit affirmed, agreeing with all of the reasons offered by the district court and in addition holding that petitioners' objection to the instructions was without merit (Pet. App. i-iii).

The decisions below are correct. Petitioners were out of time under Rule 34. Neither Section 2255 nor Rule 35 is available to correct trial errors (such as allegedly erroneous instructions) which are neither jurisdictional nor constitutional. *Hill* v. *United States*, 368 U.S. 424, 428, 430.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

OCTOBER 1970.

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[2] As noted in the government's prior brief in opposition (No. 215, O.T., 1968) the government's evidence showing that petitioners knew the property was stolen necessarily showed that the property was stolen from the United States. Petitioners' defense, which the jury rejected, was that they did not know the property was stolen.

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